

IN THE SUPREME COURT OF THE STATE OF HAWAII

EUGENE L. SABADO
CLERK OF APPELLATE COURTS
STATE OF HAWAII

2002 JUL 11 P 1:25

FILED

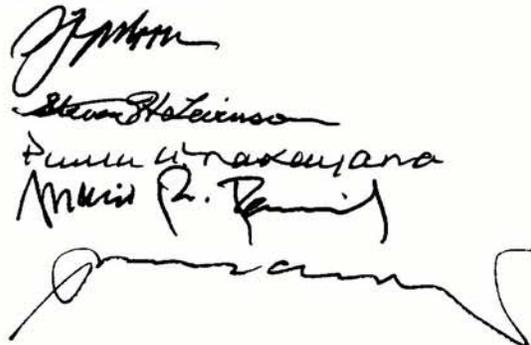
In the Matter of the
GUIDELINES FOR HAWAII MEDIATORS

RESOLUTION ENDORSING THE GUIDELINES FOR HAWAII MEDIATORS
(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

By resolution filed April 22, 1986, this court endorsed the *Standards for Private and Public Mediators in the State of Hawai'i* (Standards). The Hawai'i Chapter of the Association for Conflict Resolution has reviewed the Standards and suggests revisions that more accurately reflect the aspirational and voluntary nature of the Standards, including a renaming of the standards to *Guidelines for Hawai'i Mediators* (Guidelines). It appears to this court that the revisions are appropriate and the Guidelines are significant aspirational guides to mediation in the State of Hawai'i. Therefore,

BE IT RESOLVED that this court endorses the Guidelines for Hawai'i Mediators, attached hereto, and encourages all mediators to make thoughtful use of the Guidelines. The Guidelines should be used with the understanding that adaptations of the Guidelines may be appropriate for particular kinds of disputes. The Guidelines are not promulgated as binding rules, and they are not intended to regulate the work of mediators.

DATED: Honolulu, Hawai'i, July 11, 2002.



GUIDELINES FOR HAWAII MEDIATORS

Reporter Note: It was suggested that we prepare a rationale for all suggested changes to explain our thinking and facilitate public discussion as well as consideration by the Hawaii Supreme Court.

Reporter 's General Comments:

- The term “guideline” has been used rather than “standard” to better reflect the voluntary nature of this document.
- The term “should” has been used throughout rather than “shall”, “will” and other words to provide consistency and indicate the aspirational nature of these guidelines.
- The term “participant” has been used rather than “disputant” (some may consider perjorative) or “party” (some may consider legalistic).
- In a few places, a preference for written agreements has been indicated but it is recognized that some practitioners and participants do not do or want this.

I. PREAMBLE AND BACKGROUND

Mediation is a process of dispute resolution in which an impartial third party intervenes in a dispute with the consent of the participants and assists them in negotiating a voluntary and informed settlement. Mediation is a separate and distinct activity from arbitration, adjudication, evaluation, counseling and therapy, although it may be used with these and/or other conflict resolution procedures.

In mediation, whether private or public, decision-making authority rests with the participants themselves. The role of the mediator includes but is not limited to assisting the participants in improving the definition of issues, reducing obstacles to communication, maximizing the exploration of alternatives, and helping them arrive at agreements that are fair, efficient, and stable.

Mediation is based on principles of communication, negotiation and problem solving that emphasize:

- the needs and interests of the participants;
- fairness;
- procedural flexibility;
- privacy and confidentiality;
- full disclosure;
- self determination.

As with other forms of dispute resolution, mediation must be built on public confidence and understanding. Persons serving as mediators, therefore, bear specific responsibilities to the mediation participants, to the mediation process, to the public, and to any specific agencies under whose auspices a mediation is taking place.

Recognizing that mediation is an increasingly accepted, respected, and desirable method of settling many disputes, the Hawaii State Judiciary, through its Program on Alternative Dispute Resolution, convened a committee (Appendix 1) in September, 1985 to develop recommended standards. After reviewing literature relevant to this matter (Appendix 2) the committee drafted proposed standards, circulated them to additional mediation groups throughout the state, and completed its recommendations to Hawaii's Chief Justice on April 2, 1986. In 1999, Hawaii's Chief Justice requested a review of the standards by the dispute resolution community through the Hawaii Chapter of the Society of Professionals in Dispute Resolution. This committee submitted recommendations to the Chief Justice on May 14, 2002.

Based on the work of these committees, the Judiciary broadly endorses the use of mediation for many types of disputes and recommends that persons serving as public or private mediators in the State of Hawaii subscribe to the following guidelines of practice. It is not the intent or desire of the Judiciary to regulate the work of mediators. The judiciary does, however, encourage mediators to view this document as general guidelines of practice.

Reporter Note: Consensus of those attending the October 6, 1999 SPIDR Hawaii meeting on the standards that mediation as a field is still developing and guidelines should be aspirational, not prescriptive.

This is consistent with the language in the Standards and the Hawaii Supreme Court's resolution adopting the Standards.

These guidelines are addressed to the practice of mediation as commonly understood. It is recognized that practitioners of ho`oponopono and other culturally based conflict resolution and conciliation methods may or may not find some or all of the guidelines appropriate or useful.

Reporter Note: This paragraph recognizes the diversity of practice in Hawaii, including cultural practices. These guidelines are not meant to cover practices not considered by practitioners and/or the public to be "mediation," e.g., ho`oponopono.

II. THE PROCESS

1. Description and Education

Before beginning mediation and throughout the process, mediators should educate participants about the mediation process, distinguish mediation from other procedures, explain the respective responsibilities of the mediator and the participants,

affirm the participant's willingness to participate in such a process, and fully explain any applicable policies, procedures, and guidelines.

2. Identification of Issues

The mediator should encourage and elicit sufficient information from the participants so that they can identify the issues to be addressed in mediation.

3. Appropriateness of Mediation

Both before and during the process, the mediator should encourage and assist the participants in evaluating the benefits, risks, and costs of mediation and the alternatives available to them. Where a mediator concludes that the participants are not informed of their rights, the mediator should encourage the participants to seek qualified legal, financial, therapeutic or other professional advice before or during the mediation process.

A mediator has a responsibility to postpone, suspend, or terminate the mediation process if one or more *participants* is unwilling or unable to participate meaningfully. The mediator should withdraw if the process is being abused or the mediator is unable to remain impartial.

4. Mediator Disclosure

A mediator should disclose to the participants the mediator's qualifications, experience and any affiliation with the participants or biases relating to the issues.

5. Procedures

Mediators should describe and affirm to the participants the procedures to be followed in mediation. Such an understanding includes but is not limited to the use of separate meetings between a participant and the mediator, provisions for confidentiality (both to the process itself and to the use of private meetings within the process), the use of legal services, the involvement of additional participants, and the conditions under which mediation may be terminated.

6. Mutual Duties and Responsibilities.

The mediator and the participants should agree upon the duties and responsibilities that each is accepting in the mediation process. This may be a written or oral agreement.

III. IMPARTIALITY

1. Impartiality

A mediator should maintain impartiality toward all participants. Impartiality means freedom from favoritism and bias in word, action and appearance. Impartiality implies a commitment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement.

A mediator has a responsibility to maintain impartiality while raising questions for the participants to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement. The mediator should withdraw if the mediator is unable to remain impartial.

2. Conflicts of Interest and Relationship

A mediator's actual or perceived impartiality may be compromised at any time by social or professional relationships with one of the participants or others affected by the dispute. A mediator should be aware that pre- and post mediation professional or social relationships may compromise a mediator's ability to serve as an impartial third party.

Mediators should disclose to the participants any relationships that might be perceived as a conflict of interest. The mediator should not proceed with the mediation unless (a) such relationships have been disclosed; (b) the role of the mediator has been made distinct from the relationships; and (c) all of the participants freely choose to proceed.

IV. COSTS AND FEES

1. Explanation of Fees and Charges

If fees are charged, a mediator or his or her agency should explain before mediation begins the fees and any other related costs to be charged. Mediators or their agencies should commit their understanding to a written agreement with the participants before the mediation process begins.

2. Contingent Fees

Reporter Note: There have been unresolved discussions about whether contingency fees should be allowed, i.e., this section eliminated or modified. Concern is: What happens to the mediation process if the mediator has a financial stake in the outcome? On the other hand, if contingent fees are prohibited then sophisticated participants who desire and use this type of fee arrangement would be prevented from using it.

Three possibilities:

- (1) Neither mediators nor their agencies should charge contingent fees or base fees on the outcome of mediation
- (2) Neither mediators nor their agencies should charge contingent fees or base fees on the outcome of mediation unless special precautions are taken to minimize potential conflicts associated with the fee arrangement.
- (3) Charging contingent fees or fees based on the outcome is normally discouraged, although in special situations with competent advice, both participants may agree to such arrangements.

Reporter Note: Virtually all standards which have considered this issue have categorically disallowed such fees, e.g.,

Model Standards of Conduct for Mediators, American Arbitration Association, American Bar Association & Society of Professionals in Dispute Resolution (1995).
Proposed Standards of Practice for Lawyers Who Conduct Divorce and Family Mediation, American Bar Association Family Law Section Task Force (July 1997).
AFM and AFCC Standards of Practice for Divorce and Family Mediation, Academy of Family Mediators & Association of Family and Conciliation Courts.
Standards of Practice for California Mediators, California Dispute Resolution Council.
State Mediation Standards of Practice, North Carolina Dispute Resolution Commission (1996).
Oregon State Mediation Standards of Practice, Oregon Mediation Association.
Standards of Practice for Mediators, The Mediation Council of Illinois.
Pennsylvania Council of Mediators Ethics and Standards of Conduct (November 6, 1998).

3. Referrals and Commissions

No commissions, rebates, or similar forms of remuneration should be given or received by a mediator for referral of clients for mediation or other related services.

V. CONFIDENTIALITY AND EXCHANGE OF INFORMATION

1. Confidentiality/Release of Information

The mediator and any mediation administrative agency, whether during pre-mediation or mediation, should hold all information acquired in mediation in confidence. Mediators are obliged to resist disclosure of information about the contents and outcomes of the mediation process.

Reporter Note: These changes are intended to cover instances in which an employee of an organization performs intake functions rather than the mediator.

A mediator should obtain the consent of the participants prior to releasing information about their mediation to others unless otherwise compelled by law. The mediator should maintain confidentiality in the storage and disposal of records and should render anonymous all identifying information when materials are used for research or training.

2. Tape Recordings and Recorded Transcripts

Recordings or transcripts of mediation proceedings or conferences should not be permitted as being inimical to free and uninhibited discussion. The mediation agreement itself may be recorded in writing, tape or otherwise.

Reason: If an agreement is reached, and the parties are willing to put it on tape, it is cumbersome to have to stop and execute an agreement to do so when everyone could just acknowledge on the tape that they agree to the procedure.

VI. SELF-DETERMINATION

1. Responsibilities of the Participants

The primary responsibility for the resolution of a dispute rests with the participants. The mediator's obligation is to assist the participants in reaching an informed and voluntary settlement. At no time and in no way should a mediator coerce any participant into agreements or make substantive decisions for any participant. Mediators may make suggestions and may draft proposals for the participants' consideration, but all decisions are to be made voluntarily by the parties themselves.

2. Responsibility to Non-Participants

A mediator has a responsibility to promote consideration of the interests of persons affected by actual or potential agreements and not present or represented at the bargaining table. Where a mediator believes the interests of an absent participant will be harmed and where the participants themselves refuse the inclusive participation, a mediator is encouraged to withdraw his or her services.

Reporter Note: There is a concern with putting a burden on the mediator to raise the idea of including additional participants. For example, is every divorce mediator now going to have to suggest that minor children should have a Guardian Ad Litem appointed to represent them at the mediation? It is felt that the first and last sentences of the paragraph adequately cover the issue.

VII. PROFESSIONAL ADVICE

1. Independent Advice and Information

A mediator should encourage the participants to obtain independent expert information and advice when such is needed to reach an informed agreement or to protect the rights of a participant. A mediator may give information only in those areas where qualified by training or experience and only with the caution that participants are encouraged to seek independent advice and counsel on the matters at hand.

2. Legal Advice

When a mediator suspects that the outcome of a mediation may potentially affect rights or obligations, the mediator should advise participants to seek legal advice prior to resolving the issues in a formal agreement.

VIII. PARTIES' ABILITY TO NEGOTIATE

1. Informational Factors

A mediator has a responsibility to promote fairness in mediation through access to information. Minimally, the mediator should encourage (a) the full disclosure of information between participants and (b) the seeking of adequate information and advice outside the mediation process.

2. Inability to Participate

If one of the participants indicated inability or appears to be unable to participate meaningfully in the mediation process, a mediator should postpone or cancel mediation.

Reporter Note: The proposed change recognizes that mediators are not necessarily skilled enough in this area to make a determination as to the condition of participants.

IX. CONCLUDING MEDIATION

1. Agreement.

When a full or partial agreement to the issues in dispute has been reached, a mediator should discuss and reach a mutual understanding with the participants on how such agreements are to be finalized, which are encouraged to be in writing or recorded.

2. No Agreement

A mediator should inform the participants of their right to withdraw from mediation at any time and for any reason. If a mediator believes that participants are unable or unwilling to participate meaningfully in the process or that a reasonable agreement is unlikely, a mediator may suspend, terminate mediation or encourage the parties to seek other forms of assistance for the resolution of their dispute. If participants reach an impasse, a mediator should not prolong unproductive discussions that would result in emotional and/or monetary costs to the participants.

X. TRAINING AND EDUCATION

1. Training

A mediator should acquire knowledge and procedural training in mediation. This includes an understanding of appropriate professional ethics, standards, and responsibilities. Upon request, a mediator should disclose the extent and nature of his or her mediation training and experience.

Reporter Note: The use of the phrase “substantive knowledge“ was problematic for some. How is one supposed to know what substantive knowledge or experience might be relevant until the mediation is underway? It is felt that discussion of “training and experience” addresses this issue.

2. Continuing Education

A mediator should participate in continuing education activities and be personally responsible for ongoing professional growth. Mediators are encouraged to join with other mediators and members of related professions to promote mutual professional development.

XI. PROFESSIONALISM AND RELATIONSHIPS WITH OTHER PROFESSIONALS

1. Responsibility of the Mediator Towards Other Mediators

A mediator whose assistance is being sought by one or more participants should endeavor to discover if other mediators are involved. A mediator should not intervene in an on-going mediation process being conducted by others. The wishes of the participants supercede the interests of the mediators.

2. Use of Information

A mediator should not use information disclosed or obtained during the mediation process for private gain or advantage nor should a mediator seek publicity from a

mediation effort to enhance his or her position. This does not preclude the promotion of mediation as a process.

3. Relationships with Other Professionals

A mediator should respect the complementary relationship that exists between mediation and other social and dispute resolution services and should promote cooperation with other professionals.

4. Advertising

A mediator should make only accurate statements about the mediation process, its costs and benefits, and the mediator=s qualifications.

XII. ADVANCEMENT OF MEDIATION

1. Pro Bono Service

Mediators are encouraged to provide free or low cost mediation to those who cannot afford it.

2. Promotion of Mediation

A mediator should promote the advancement of mediation by encouraging and participating in research, evaluation, or other forms of professional development and public education.

APPENDIX 1

Committee On Mediation Standards

The following agencies and organizations participated in the drafting of these standards:

- ! American Arbitration Association (Mr. Keith W. Hunter)
- ! Armed Services YMCA Community Mediation Service (Ms. Josie Blevins)
- ! Better Business Bureau of Hawaii, Inc. (Mr. Frank S. Conkey)
- ! Children's Divorce Clinic, Kapiolani Women's and Children's Medical Center (Dr. Jane A. Waldron)
- ! Hawaii State Bar Association, Section on Alternative Dispute Resolution (Mr. Frank T. Lockwood and Mr. Gerald S. Clay)
- ! Honolulu Board of Realtors Mediation Committee (Ms. Dorothy Read)
- ! Judiciary Program on Alternative Dispute Resolution (Dr. Peter S. Adler)
- ! Neighborhood Justice Center of Honolulu, Inc. (Mr. Leland K.W. Chang)
- ! University of Hawaii Program on Conflict Resolution (Dr. David Chandler)
- ! Ms. Melody Parker, William S. Richardson School of Law, University of Hawaii

Helpful comments and criticisms were also received from:

- ! Ms. June Amimoto, Program Director, Ku'ikahi YMCA Mediation Center, Waiakea Settlement YMCA
- ! Dr. Ted Becker, Chairman and Coordinator, Master's Degree Program in Conflict Resolution, Peacemaking and Mediation, Department of Political Science, University of Hawaii
- ! Mr. Mark K. Bradley, Ms. Jocelyn M. Higa and Mr. David Swartout, ASUH Student Mediation Service, University of Hawaii
- ! Mr. Robert Coulson, President, American Arbitration Association
- ! Mr. Michael M. Hazama, Mediation Services of Maui, Inc.
- ! Judge Shunichi Kimura, State of Hawaii Judiciary, Third Circuit, First Division
- ! Judge Evelyn B. Lance, State of Hawaii Judiciary, First Circuit, Family Court
- ! Judge Marie N. Milks, State of Hawaii Judiciary, First Circuit, Sixteenth Division
- ! Judge Ronald T.Y. Moon, State of Hawaii Judiciary, First Circuit, Ninth Division
- ! Commissioner Frank S. Schoeppel, Federal Mediation and Conciliation Service

APPENDIX 2 Documents Consulted

- American Arbitration Association. *Code of Ethics for Arbitrators In Commercial Disputes*, (1977).
- Baker-Jackson, Maxine; Bergman, Kay; Ferrick, George; Housepian, Vahana; Garcia, Julian; and Hulbert, Ron. "Ethical Standards For Court-Connected Mediators," *Mediation Quarterly*, No. 8, (June 1985): 67-72.
- Bishop, Thomas. "Standards For Family And Divorce Mediation," *Dispute Resolution Forum*, (December 1984): 3-9.
- Chaykin, Arthur. "Mediator Liability: A New Role For Fiduciary Duties?" *Cincinnati Law Review*, Vol. 53, (1984): 731-764.
- Cormick, Gerald. "The Ethics of Mediation: Some Unexplored Territory," a paper presented to the Society for Professionals in Dispute Resolution, (October 1977).
- Cramer, Clarence and Schoeneman, Russell. "A Court Mediation Model with an Eye Toward Standards," *Mediation Quarterly*, No. 8 (June 1985): 33-46.
- Duryee, Mary. "Public Sector Mediation: A Report From the Courts," *Mediation Quarterly*, No. 8, (June 1985): 47-56.
- Federal Mediation and Conciliation Service of the United States. *Code of Professional Conduct For Labor Mediators*, (1971).
- Goldberg, Stephen; Green, Eric; and Sander, Frank. "A Dialogue On Legal Representation In Divorce Mediation," *Mediation Quarterly*, No. 8 (June 1985): 5-8.
- Hay, Linda; Carnevale, Carol; and Sinicropi, Anthony. "Professionalization: Selected Ethical Issues In Dispute Resolution," *The Justice System Journal*, Vol. 9 (1984): 228-244.
- McIsaac, Hugh. "Confidentiality: An Exploration Of Issues," *Mediation Quarterly*, No. 8 (June 1985): 57-66.
- Milne, Ann. "Model Standards Of Practice For Family and Divorce Mediation," *Mediation Quarterly*, No. 8 (June 1985): 73-81.
- Neighborhood Justice Center of Honolulu, Inc. "Ethics and Responsibilities," *Mediator Training Manual*, (1983): 1.7-1.9.
- Perlmutter, Felice Davidson. "Ethical Issues In Family Mediation: A Social Perspective," *Mediation Quarterly*, No. 8 (June 1985): 99-105.
- Riskin, Leonard. "Toward New Standards For The Neutral Lawyer In Mediation," *Arizona Law Review*, Vol. 26 (1984): 329-362.
- Saposnek, Donald. "What Is Fair In Child Custody Mediation?" *Mediation Quarterly*, No. 8 (June 1985): 9-18.